AGNES LURDASAMAY v. NAVANEETHAN MUNIANDY

HIGH COURT MALAYA, PENANG
AHMAD SHAHRIR MOHD SALLEH JC
[CIVIL APPEAL NO: PA-12BNCVC-16-12-2016]
3 JULY 2017

CIVIL PROCEDURE: *Judgments and orders – Order to compel – Deoxyribonucleic Asid ('DNA') application to compel alleged father of child to undergo DNA test – Allegations of intimate relationship resulting in birth of child – Whether there are written laws in Malaysia to compel DNA test without consent – Whether Deoxyribonucleic Acid (DNA) Identification Act 2009 applicable to civil proceedings – Whether court could compel alleged father to undergo DNA test*

EVIDENCE: *Proof – Paternity – Allegations of intimate relationship resulting in birth of child – Determination of paternity of child – Whether mother adduced sufficient prima facie evidence to show relationship was sexual – Whether sufficient to establish that child was conceived due to sexual relationship*

The appellant was married to one Muniswaran who later left the appellant since September 1999. Not knowing Muniswaran's whereabout and while still married to Muniswaran, the appellant alleged that she and the respondent had undergone a customary Hindu wedding on 18 June 2012. According to the appellant, the respondent stayed with her and she became pregnant as a result of an alleged intimacy with the respondent. The child was born on 18 June 2012 ('the child'). The respondent denied being the father of the child and asserted that he only gave some financial assistance to the appellant between 2000 and 2011 out of pity for her. The respondent's evidence was supported by that of his wife ('SP2') who testified that the respondent never spent the night out since their marriage in 1982 and that the respondent always went out for work at 7.45am and came back not later than 7.45pm every day. The appellant commenced an action at the Sessions Court, seeking, *inter alia*, an order compelling the respondent to undergo a DNA test to determine whether he was the biological father of the child. Dismissing the appellant's claim, the Sessions Court Judge ('the SCJ') in acknowledging that the Deoxyribonucleic Acid ('DNA') Identification Act 2009 ('the DNA Act') only applies to criminal cases, found that (i) s. 14 of the DNA Act specifically provides for a situation where a person voluntarily gives his consent in the appropriate form for the taking of his intimate or non-intimate sample for purposes of a DNA test; (ii) there was no specific provision, either in the DNA Act or any other statute, which could compel a person to undergo a DNA test; and (iii) a person is perfectly entitled to submit himself to a DNA test and the court could not order him to do so. Hence the present appeal. Relying on the case of *Lim Hooi Teik v. Lee Lai Ching ('as next of kin to Lee Chee Zheng and on her behalf)* ('*Lim*'s case'), the

A appellant argued that once a relationship on a *prima facie* basis was proven, the court ought to have compelled the respondent to undergo a DNA test to determine the paternal relationship between the respondent and the child. The respondent, on the other hand, argued that there is no provision of the law which enables the court to compel the respondent to submit himself to
B undergo a DNA test and the DNA Act was not applicable.

Held (dismissing appeal with costs):

(1) The fact that the respondent gave some sort of financial assistance to the appellant since 2000 until 2011, which was not denied by the respondent, deserved an affirmative finding that a relationship did exist
C between the respondent and the appellant. No reasonable person would render such a prolonged financial assistance unless there existed some kind of relationship. However, the appellant had not adduced sufficient *prima facie* evidence to show that the relationship was one which fulfilled the requirement in *Lim*'s case. Evidence of an intimate relationship
D without specifically referring to any sexual relationship fell short of the required *prima facie* proof. The evidence of 'intimate relationship' adduced by the appellant was not sufficient to establish the fact that the child was conceived as a result and that the respondent must have the knowledge that he could be the father. (paras 19 & 22)

E **(2)** The appellant failed to discharge her burden on a balance of probabilities. The evidence led by the appellant that she and the respondent had an intimate relationship left the court in doubt as to whether that intimate relationship actually involved sexual relationship in light of the respondent's denial and the unchallenged evidence of SP2
F that the respondent had never spent the night out since their marriage. (paras 22 & 24)

Case(s) referred to:

Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal [2016] 2 CLJ 563 CA ***(refd)***

G *Lau Zhan Chen (an infant by his mother and next friend Lau Fatt Wan (f) v. Makoto Togase & Ors [1995] 1 CLJ 841 HC* ***(refd)***

Lee Lai Ching v. Lim Hooi Teik [2013] 4 CLJ 107 HC ***(refd)***

Lim Hooi Teik v. Lee Lai Ching (as next of Kin to Lee Chee Zheng and on her behalf) [2016] 3 CLJ 529 CA ***(foll)***

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***

H *Pathmanabhan Nalliannen v. PP & Other Appeals [2017] 4 CLJ 137 FC* ***(refd)***

Peter James Binsted v. Jevencia Autor Partosa [2000] 2 CLJ 906 HC ***(refd)***

PP v. Hanif Basree Abdul Rahman [2004] 3 CLJ 700 HC ***(refd)***

PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***

Sean O'Casey Patterson v. Chan Hoong Poh & Ors [2010] 1 LNS 300 CA ***(refd)***

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Legislation referred to:
Deoxyribonucleic Acid (DNA) Identification Act 2009, ss. 12, 13, 14

For the appellant - Harbhajan Kaur Ranjit Singh & Chandra Segaran Achannah; M/s Harbhajan Kaur & Partners
For the respondent - Supramaniam Kasia Pillai; M/s Supramaniam & Partners

Reported by Najib Tamby

JUDGMENT

Ahmad Shahrir Mohd Salleh JC:

Introduction

[1] The appellant commenced an action in the Sessions Court against the respondent for an order that the defendant be compelled to undergo a "deoxyribonucleic acid" ("DNA") test to determine whether the respondent is the biological father of the child, Varthan. The appellant also prayed for:

(a) An order that the Director-General of Births and Deaths, Malaysia to re-register the child, Varthan, and include the name of the respondent, Navaneethan a/l Muniandy as the lawful father in the certificate of birth;

(b) An order that the maintenance for the child, Varthan, in the sum of RM350,000 be paid in a lump sum;

(c) An order that after his name has been included in the certificate of birth for the child, Varthan, the respondent be prevented access to the child, Varthan at any time and that thereafter, the child, Varthan, will not demand for any part of the respondent's assets;

(d) cost; and

(e) other reliefs as this honourable court deems fit.

[2] After a full trial, the learned Sessions Court Judge dismissed the appellant's case with cost. The appellant is dissatisfied with the decision of the learned Sessions Court Judge and appeals against the whole of that decision.

Brief Facts

[3] The appellant was married to one Muniswaran ('SD2') and had four children from that marriage. The appellant is the natural mother of the child, Varthan ('the child'). The child was born on 18 June 2012. The appellant claims that the respondent is the natural father of the child.

[4] The appellant led evidence to show that on 1 June 2006 while still married to Muniswaran, she and the respondent had undergone a customary Hindu wedding at the Vinayagar Temple, Jalan Waterfall, Penang. At the material time of the alleged marriage with the appellant, the respondent was

still lawfully married to SD2. At the time of the alleged marriage, the appellant alleged that her husband had left her since September 1999 and that she does not know his whereabouts. The alleged marriage was witnessed by the appellant's friend (SP1), the appellant's 12-year old daughter (SP2) and the appellant's sister (SP3).

[5] According to the appellant, she lived with the respondent like husband and wife since their marriage with the knowledge and consent of their respective family. The appellant alleged that on 14 November 2011 she had become pregnant as a consequence of the intimacy with the respondent. It was alleged that when the appellant informed the respondent of her pregnancy, the respondent became abusive towards her and had forced her have an abortion. The respondent allegedly took the appellant to Klinik Rakyat on 20 December 2011 to have the abortion but the appellant was told by the staff to come the next day because the clinic was busy then. The appellant had later ran away for three days to Kuala Lumpur and never went to the clinic again because she did not want to have the abortion. The child was later born on 18 June 2012.

[6] The appellant gave evidence that the respondent gave her monthly allowances for household and children expenses. This was supported by the respondent himself who said in evidence that he gave the appellant RM200 monthly because the respondent felt pity for the appellant and her family who are in need of financial support. The appellant's husband was not earning a fixed income and the appellant had difficulties to raise her children who were still small. At one point, the respondent and his wife even took care of one of the appellant's daughter for a few months. The respondent was first introduced to the appellant by his friend, Mr Thanggamani. Mr Thanggamani also took care of one of the appellant's child before.

[7] The respondent stopped giving financial assistance to the appellant when he started to undergo treatment for his heart ailment. Thereafter, the appellant started to visit the respondent's office and demanded from the respondent's employees for the respondent to give her a certain sum of money. The respondent refused to give the appellant the money she demanded and the relationship then turned sour with allegations of verbal abuse and property damage.

[8] The appellant alleged that the respondent is the father of the child, named Varthan, she gave birth to on 18 June 2012. The respondent had denied this allegation throughout. The respondent refused to undergo a DNA test to determine the paternity of the child. The appellant brought an action against the respondent for an order that the appellant be ordered to undergo the DNA test and for other reliefs as stipulated in the earlier part of this judgment.

Decision Of The Sessions Court

[9] In dismissing the appellant's claim, the learned Sessions Court Judge proceeded to determine the case solely on the basis of whether the court is empowered to order the respondent to undergo a DNA test pursuant to the Deoxyribonucleic Acid Identification Act 2009 ("DNA Act") where the respondent refuses to voluntarily subject himself to such test. The learned Sessions Court Judge, in acknowledging that the DNA Act only applies to criminal cases, found that s. 14 of the DNA Act specifically provides for a situation where a person voluntarily gives his consent in the appropriate form for the taking of his intimate or non-intimate sample for purposes of a DNA test. The learned Sessions Court Judge decided that there is no specific provision either in the DNA Act or any other statute which can compel a person to undergo a DNA test. The learned Sessions Court Judge recognised that a person is perfectly entitled to refuse to submit himself to a DNA test and that the court cannot order him to do so.

[10] In coming to her decision, the learned Sessions Court Judge considered the cases of *Peter James Binsted v. Jevencia Autor Partosa* [2000] 2 CLJ, 906 HC, Lau Zhan Chen (an infant by his mother and next friend *Lau Fatt Wan (f) v. Makoto Togase & Ors* [1995] 1 CLJ 841 HC and *Lee Lai Ching v. Lim Hooi Teik* [2013] 4 CLJ 107 HC.

Arguments Of Parties

[11] In support of the appeal, counsel for the appellant relied on the case of *Lim Hooi Teik v. Lee Lai Ching (as next of Kin to Lee Chee Zheng and on her behalf)* [2016] 3 CLJ 529 CA and argued that the respondent ought to have been ordered to undergo the DNA test because the appellant had succeeded in proving a *prima facie* case against the respondent pursuant to the test enunciated by the Court of Appeal. Counsel for the appellant contended that once a **relationship** (emphasis added) on a *prima facie* basis is proven, the court ought to have made an order to compel the respondent to undergo a DNA test to determine the paternal relationship of the respondent *vis-à-vis* the child. An order to compel the respondent to undergo a DNA test would in the circumstances be in the best interest of the child.

[12] Counsel for the appellant also argued that the appellant has led sufficient circumstantial evidence to prove the relationship between the appellant and the respondent. The appellant relied on the authority of *Pathmanabhan Nalliannen v. PP & Other Appeals* [2017] 4 CLJ 137 FC. Counsel for the appellant took the position that it is of little value to produce any evidence to prove the fact that the respondent did in fact take the appellant to Klinik Rakyat at Bayan Lepas, Pulau Pinang to have an abortion as alleged by the appellant in her evidence because the child has already been born.

[13] The respondent on the other hand, contended that there is no provision of the law which enables the court to compel the respondent to submit himself to undergo a DNA test and the DNA Act is not applicable to the present appeal. The respondent also submitted that the claim for maintenance for RM350,000 in a lump sum made by the appellant against the respondent purportedly for maintenance of the child was not supported by any evidence and is akin to extortion. The respondent maintained that the appellant's husband was still alive and that the appellant was still legally married to him (Muniswaran).

Analysis And Decision Of This Court

[14] DNA profiling or DNA test as it is commonly referred to, is the scientifically accepted test which is used to identify individuals by characteristics of their DNA. In *PP v. Hanif Basree Abdul Rahman* [2004] 3 CLJ 700 HC, the importance of DNA profiling for identification purposes has been explained by the chemist and noted in the judgment as follows:

> Mr. Lim Kong Boon, the government Chemist (SP14) and Head of Crime DNA Unit at the Serology and DNA Section of the Chemistry Department Petaling Jaya, said that DNA (deoxyribonucleic acid) which is a genetic material found in the nucleus of the cells, which molecules make up the chromosomes is actually the blueprint of all human beings. DNA profiling is a technique where a person's DNA is analysed. He explained that no two persons, except for identical twins have identical chromosomes. SP14 also explained in elaborate detail on the process and methodology of obtaining a DNA profile. He also stated that a DNA profiling with almost positive certainty, would be able to identify someone whose evidence sample is the same as the reference sample.

In the sphere of forensic analysis, it is scientifically proven that an individual inherits half their DNA from their father and half from their mother. Closely related individuals such as siblings have more similarities in their DNA than unrelated individuals.

[15] The long title of the Deoxyribonucleic Acid Identification Act 2009 ("DNA Act") provides as follows:

> An Act to provide for the establishment of a Forensic DNA Databank Malaysia, the taking of DNA samples, forensic DNA analysis, the use of DNA profiles and information in relation thereto, and for matters connected therewith.

Sections 12 and 13 of the Act provides for the taking of intimate and non-intimate samples, respectively under the Act, of the following category of persons:

(a) A person reasonably suspected of having committed an offence;

(b) A detainee; or

(c) A drug dependant,

and s. 15 of the Act provides for the taking of intimate or non-intimate samples of prisoners. Intimate samples for the purposes of a forensic DNA analysis may only be taken under s. 12 of the Act if the appropriate consent in the prescribed form is given by the person from whom the intimate sample is to be taken. For non-intimate samples under s. 13 of the Act, a Magistrate is empowered to order the person to provide his non-intimate sample if that person refuses to give the sample or refuses to allow the sample to be taken from him without good cause or the sample cannot be obtained despite all reasonable efforts taken provided the Magistrate is satisfied that there is reasonable cause to believe that the sample tends to confirm or disprove the commission of an offence by that person. Section 14 of the Act specifically refers to cases where the person voluntarily gives the appropriate consent in the prescribed form for the taking of his intimate or non-intimate sample. Save for the purposes underlined under the Act, there is no other provision which specifically allows the court to order a person to undergo a DNA test under the DNA Act. I am thus of the view that the DNA Act has no application in the present case.

[16] In *Lim Hooi Teik v. Lee Lai Ching (as next of Kin to Lee Chee Zheng and on her behalf)* [2016] 3 CLJ 529 CA, the Court of Appeal in finding that a *prima facie* case has not been proved against the defendant to necessitate a DNA test to determine the paternity of the minor, made the following observations:

> [23] On the consideration of the facts and issues in issue as disclosed in the pleadings, we do not think that this is an appropriate case for the disposal of the action on a point of law without the full trial of the action. We take the view that before an order can be made to compel a defendant to under a DNA test to determine the paternity of a minor, the plaintiff must have made out a *prima facie* case against the defendant.
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> [24] In this case, the defendant denies the plaintiffs allegation that she and the defendant were in an intimate relationship for nine years and that the minor was conceived. Accordingly, the submission of learned counsel for the plaintiff that the primary facts relating to the relationship between the plaintiff and the defendant had been taken as agreed is without merit.
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> [25] In the circumstances, the plaintiffs claim that there was an intimate relationship remains to be proved; as such it is still a fact in issue. Even if it is assumed that there was a relationship between the parties, does it necessarily follow that the defendant knows that he is the father of the minor. In our considered opinion, it would be a matter of conjecture to hold accordingly. At any rate, it is a matter of evidence to be led to show that the defendant knows of that fact, if at all.

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> [26] We take the view that at the very least, the plaintiff ought to have produced evidence to prove that fact of the relationship as pleaded; and that such relationship once proven would warrant the making of an order to compel the defendant to undergo a DNA test for the purpose of determining the paternity of the minor.

B **[17]** A case is said to have been proved on a *prima facie* basis when sufficient evidence, though not conclusive, has been adduced to establish a fact. In the case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 MLJ 65 CA, His Lordship Gopal Sri Ram JCA (as he then was) referred to the judgment of His Lordship Vincent Ng J (as he then was) in the case of
C *Public Prosecutor v. Ong Cheng Heong* [1998] 4 CLJ 209; [1998] 6 MLJ 678 which discussed the term *prima facie* in the following words at p. 225 (CLJ); p. 691 (MLJ):

> What then constitutes a '*prima facie* case'? '*Prima facie*' means on the face of it or at first glance. To me, in the light of Act A979, perhaps the most appropriate definition of a '*prima facie* case' could be found in the Oxford
D Companion of Law (p 987), which has it as:
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> > A case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive.

E **[18]** In the present appeal, the appellant in relying on the Court of Appeal decision in the case of *Lim Hooi Teik* seeks to move this court to grant her an order to compel the respondent to undergo a DNA test to determine the paternity of the child. The appellant relies on the evidence of the monthly financial assistance given to the appellant by the respondent, the alleged
F customary wedding ceremony at the temple, the purchase of the house and the car allegedly partly funded by the respondent. The appellant also gave evidence that the respondent stayed with her although this was refuted by the respondent's wife (SP2) who said in evidence that the respondent had never spend the night out since they wed in the year 1982 and that the respondent had always went out for work at 7.45am and came back not later than
G 7.45pm, every day.

[19] I am of the view that the fact that the respondent gave some sort of financial assistance to the appellant since the year 2000 until 2011, which is not denied by the respondent save for the amount of such financial assistance,
H deserves an affirmative finding that a relationship does exist between the respondent and the appellant. I am of the view that no reasonable person would render such a prolonged financial assistance unless there exists some kind of relationship. However, does this kind of relationship provides sufficient *prima facie* evidence that the respondent is the biological father of the child which necessitates this court to order him to undergo a DNA test
I to confirm the paternity of the child?

[20] The appellant gave evidence that the child was born as a consequence of the intimacy with the respondent, which the respondent denies. The appellant also alleged that when the respondent learnt of the fact of her pregnancy, the respondent had brought her to Klinik Rakyat at Bayan Lepas, Pulau Pinang to have an abortion but the abortion did not take place because the clinic was busy then and that the appellant had ran away to Kuala Lumpur for three days to avoid the abortion. In *Lim Hooi Teik*, the Court of Appeal held that the fact of the intimate relationship remains a fact to be proved and that "even if it is assumed that there was a relationship between the parties, does it necessarily follow that the defendant knows that he is the father of the minor" (emphasis added).

[21] In the present appeal, while I am of the view that a relationship exists between the respondent and the appellant, I am not prepared to find, based on the facts and circumstances of the present appeal, that the relationship is of such a nature that resulted in the child being conceived as a result. Against the totality of the evidence surrounding the relationship, the appellant's evidence with regard to the intimate relationship are as follows:

S20: Bagaimana hubungan intimasi di antara Defendan dan kamu?

J20: Sebelum perkahwinan tersebut iaitu semasa kami duduk bersama dari tahun 2000, kami dalam seminggu akan berintimasi 2 hingga 3 kali. Selepas perkahwinan ianya jadi lebih hari.

[22] I am of the view that the appellant had not adduced sufficient *prima facie* evidence to show that the relationship which existed between the appellant and the respondent is one which fulfils the requirement as decided by the Court of Appeal in the case of *Lim Hooi Teik*. I am of the view that evidence of an intimate relationship without specifically referring to any sexual relationship falls short of the required *prima facie* proof. There was also no evidence to support the appellants version about the attempted abortion which could lend some credence to suppose that the respondent in fact did something more than any good Samaritan would on humanitarian grounds. The evidence of "intimate relationship" as adduced by the appellant in the circumstances is not sufficient to establish the fact that the child was conceived as a result and that the respondent must have the knowledge that he could be the father of the child. On the evidence, I am of the opinion that the appellant has failed to discharge her burden on a balance of probabilities.

[23] In the case of *Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal* [2016] 2 CLJ 563 CA, the Court of Appeal made the following observations with regard to burden of proof at p. 573:

In *Re B* [2008] UKHL 35, Lord Hoffmann using a mathematical analogy explaining the burden of proof stated:

> If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.
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> We were of the view that the maxim, "he who avers must prove" and prove he must on a balance of probabilities should be adhered to by the court. (See ss. 101 and 102 of the Evidence Act 1950; *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 CA; UN *Pandey v. Hotel Marco Polo Pte Ltd* [1978] 1 LNS 223; [1980] 1 MLJ 4; *Sundram Ramasamy v. Arujunan Arumugam & Anor* [1994] 4 CLJ 300 and *Syed Mohamed Syed Alwi & Ors v. Shariffah Badariah Alwi Al-Attas & Ors And Other Cases* [2009] 1 LNS 1234).

[24] Similarly, I am of the view that the appellant has failed to prove a fact in issue, namely whether the respondent in fact has had a sexual relationship with the appellant which led to the child being conceived. The evidence led by the appellant that she and the respondent had an intimate relationship has left this court in doubt as to whether that intimate relationship actually involves sexual relationship in light of the respondent's denial and the unchallenged evidence of SP2 that the respondent had never spend the night out since their marriage.

[25] For purposes of completeness, I also find it unusual for the appellant to seek maintenance in the sum of RM350,000 from the respondent and at the same time prays for an order that the respondent be prevented access to the child after Director-General of Births and Deaths, Malaysia has re-registered the child and include the name of the respondent as the lawful father of the child in the certificate of birth. I am of the opinion that it would not be in the best interest of the child to keep his biological father away from him. I am of the view that a claim which prays for an order that prevents a natural father from seeing or having access to his child cannot fall within the meaning of a claim "made in the best interest of the child". I am of the view that the order sought for by the appellant is not an order ordinarily sought for in the best interest of the child even in its widest sense. In the case of *Sean O'Casey Patterson v. Chan Hoong Poh & Ors* [2010] 1 LNS 300 CA, His Lordship Azhar Hj Ma'ah JCA (as he then was) in delivering the judgment of the Court of Appeal made the following observations in deciding what the term "in the best interest of the child" means:

Having arrived at the aforesaid finding it should logically follow that all the prayers except for prayer (a) asked for by the appellant in his application before the High Court below are unsustainable, as granting of those orders, in our view would not be in the best interest of the child concerned. In this regard we quote a passage from the decision of Lindley LJ in *In Re McGrath* [1893] 1 Ch. 143, which states:

> The duty of the Court is, in our judgment, to leave the child alone, unless he is satisfied that it is for the welfare of the child that some other course shall be taken. The dominant matter for consideration of the Court, is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded. The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child.

Conclusion

[26] Based on the aforesaid grounds, I do not find any reasons to intervene in the decision of the learned Sessions Court Judge. I therefore affirm the decision of the learned Sessions Court Judge and dismiss the appeal with RM5,000 cost. The deposit is refunded.